IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 66 of 1990

For Approval and Signature:

HON'BLE MR JUSTICE H.H. MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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RAMESHKUMAR HARJIVANDAS

Versus

STATE OF GUJ

Appearance:

MR BC DAVE for Petitioners

MS KATHABEN GAJJAR for Respondent No. 1

CORAM : MR.JUSTICE H.H.MEHTA

Date of Order: 28/04/2000

CAV JUDGEMENT

#. This is a Criminal Revision Application under Section 401 read with Section 397 of the Criminal Procedure Code,

1973 (for short, Cr.PC) filed by the original accused who has been convicted and sentenced by the Judge of Special Court constituted under Section 12(A) of the Essential Commodities Act, 1955, (for short, "the Act") by rendering a judgement dated 7.2.1990 in Special Criminal Case No.110 of 1989 which was there pending on his file. The Criminal Revision Petitioner was original accused in Special Criminal Case No.110 of 1990. The Revision Opponent is the State i.e. the Prosecution. Therefore, the parties will be referred to hereinafter as the prosecution and accused respectively for the sake of convenience. By the said judgement the accused has been convicted for an offence punishable under Section 7 of the Act for a contravention of Section 3 of the Kerosene (Restriction on Use) Order 1966 (for short, "Order") and he has been sentenced to undergo RI for 3 months.

Formerly, the accused had preferred Criminal Appeal No.136 of 1990. Looking clause (b) of Section 373 of Cr.PC no appeal lies in case in which accused has been convicted by a Court of Sessions for imprisonment for a term not exceeding three months. Therefore, on or about 6.3.1990 this Court (Coram: J.U. Mehta, J.) granted permission to the accused to covert his Criminal Appeal No.136 of 1990 into revision and therefore said Criminal Appeal has been converted to this present Criminal Revision Application.

#. The facts leading to this present Criminal Revision Application in a nutshell are as follows:-

On or about 12.12.1988, at about 5 PM the complainant, Shri R.S. Sindhi, PSI, was on his duty at Kalupur Overbridge, Ahmedabad. Along with him, certain traffic police constables and one expert from Forensic Science Laboratory ("FSL" for short) were also present. The complainant was in-charge of the raid at the relevant time to take action against auto-rickshaws which were found plying with kerosene as fuel. It is further the case of the prosecution that at that time one rickshaw bearing RTO registration No.GRS 3513 was seen coming from Ahmdupura side. That rickshaw was being driven by the accused who is the present Revision-Petitioner. The complainant and the persons who were accompanying him, found that the rickshaw was emitting huge smoke from its silencer. On seeing this rickshaw, the complainant stopped that rickshaw at the place where they were standing. At that time some sample fuel from the tank of the rickshaw was subjected to its preliminary examination by the expert of the FSL who was accompanying the

complainant. The expert of the FSL opined that the fuel which was being used by driver/owner of the said rickshaw was adulterated with kerosene. Therefore, in the presence of two panch witnesses sample of fuel from the tank of the rickshaw was taken by the complainant. It was thereafter duly sealed by affixing one slip bearing the signatures of the two panch witnesses and the complainant. Thereafter, the complainant drew the panchnama in the presence of the panch witnesses with respect to what was found and what the formalities were done. The same was signed by the complainant and two panch witnesses. The complainant, thereafter, lodged his complaint against accused in Ahmedabad City Sheherkotda Police Station. That complaint came to be registered as C.R. No.II 805 of 1988 for offences punishable under Sections 3-7 of the Act. Thereafter, the said case which was registered on the basis of the complaint lodged by the complainant, was investigated by PSI Shri V.K.Sonwane and he chargesheeted the accused to the Court of SPecial Judge on or about 5th October 1989. That chargesheet came to be registered as Special Criminal Case No.110 of 1989.

#. The learned Judge of the Special Court tried the case summarily as per the provisions contained in Chapter 21 of Cr.PC read with clause (b) of Section 12(AA) of the Act. Therefore, he recorded plea of the accused at Exh.1 on 14.12.1989. The accused pleaded not guilty to the charge. Thereafter, the prosecution examined four witnesses in support of its case by which plea was recorded. The prosecution led documentary evidence also. On completion of the recording the evidence of prosecution further statement of the accused u/s 313 of the Act was recorded on 6.12.1990. Thereafter the arguments of both the parties were heard at length by the learned Judge of the trial Court and thereafter, after appreciating the evidence led by prosecution, the learned Judge of the trial Court came to the conclusion that case against the accused has been proved beyond reasonable doubt and therefore by rendering his judgement dated 7.2.1990 he convicted and sentenced the accused as aforesaid.

#. Being dissatisfied with and aggrieved against the said judgment of conviction and sentence, the original accused has preferred this Criminal Revision Application.

#. I have heard Shri B.C. Dave, learned advocate for the Criminal Revision Petitioner and Ms Kathaben Gajjar, the learned APP for the Revision Opponent - State in detail at length. I have perused the entire record of

the case which has been called for from the trial Court.

#. Shri B.C. Dave, learned advocate for the accused has assailed the judgement of conviction and sentence passed in Special Criminal Case No.110 of 1989 mainly on the following grounds:-

(A) The report of the FSL does not conform the requirements of analysis to prove that particular liquid which was being used as a fuel was a kerosene as defined in item no.2710.19 of Chapter 27 of the Central Excise Tariff Act, 1985. He has argued that as per item no.2710.19 definition of kerosene is as follows

> "Kerosene (which is ordinarily used as an illuminant in oil burning lamps) and aviation turbine fuel that is to say, any hydrocarbon (oil excluding mineral colza turpentine substitute) which has a smoking point of 18 mm or more and has a final boiling point not exceeding 300 degree Centigrade"

Shri B.C. Dave has further argued that in view of the above definition, the expert of FSL ought to have carried out a test with regard to final boiling point. He has further argued that in this case an expert of FSL - Mrs. Pallaviben B Thakar, who has given her evidence at ex.4 has deposed nothing about any test with regard to boiling point of sample of fuel which was received by FSL and therefore his main thrust of the arguments is to the effect that the article which was analysed by the expert of FSL was not kerosene.

(B) Mr Dave has further argued that after recording of the evidence of the witnesses of the prosecution the learned Judge of the trial Court recorded further statement of the accused under Section 313 of Cr.PC but in that statement he has not asked any question by drawing an attention of the accused that he has contravened Section 3 of the Order and therefore his defence has been prejudiced. In support of his arguments, he has cited one authority of Sharad V. State of Maharashtra reported in AIR 1984 SC 1622. He has further argued that as per the principles laid down in the aforesaid authority it was mandatory for the learned Judge to put the circumstnaces appearing against the accused in further statement and further that had he asked that question to the accused, accused could have given his explanation properly to the satisfaction of the Court and as such type of question has not been asked, the accused should be given a benefit of doubt and he

should be acquitted.

(C) During the course of the arguments the revision petitioner submitted one affidavit dated 24.3.2000 stating inter alia that after the incident he has sold out his rickshaw and he has stopped rickshaw plying since long and therefore now there is no question of repetition of the similar offences being committed in future. The Revision-Petitioner has also requested in his affidavit that he may be released on probation under the Probation of Offenders Act and in support of this request Shri Dave has cited an authority of the STATE OF GUJARAT V G.P. JOSHI 1988 (2) GLH 787 in which the benefit of probation was granted to the accused who was tried for an offence punishable u/s 7 of the Act.

(D) Shri B.C. Dave has further argued that after an order of conviction and sentence, period of about 12 years has elapsed and therefore it would not be in the larger interest of justice to send the accused in jail for an offence which was committed before about 12 years.

(E) It is one of his arguments that there is no evidence on record to show that accused had added kerosene in tank of the rickshaw and thus prosecution has failed to prove that accused has used kerosene. It is his further argument that sample of fuel was taken from carburettor and therefore naturally there would be presence of a mixture of oil and petrol in the carburettor and under these circumstances prosecution has not proved its case beyond reasonable doubt and therefore the accused should be given benefit of doubt and he should be acquitted. Shri Dave has vehemently argued that if this Court finds that there is a slightest breach in coming to a conclusion by the expert of FSL by analysing the sample then, that benefit should be given to the accused.

#. In reply to the arguments of Mr Dave, Ms Kathaben Gajjar, the learned APP, for the State has vehemently argued that looking to the judgement there is no flaw in the judgement and the prosecution has proved the case beyong reasonable doubt and looking to the judgement the learned judge of the trial court has given all cogent and plausible reasons to arrive at a conclusion that accused has committed an offence for which he has been chargesheeted to the Court. She has further argued that looking to the report of FSL for analysis of the sample of fuel three different methods were adopted for analysis by the expert and as a result of such analysis the expert

of the FSL has come to a definite conclusion that sample of fuel was found to be mixture of petrol and kerosene hydro-carbons considering the presence of lubricating oil and when the accused has not challenged this report exh.6 of the expert of the FSL, the prosecution has proved beyond reasonable doubt that the sample of the fuel which was taken from the tank of the rickshaw was containing kerosene and when it is an admitted fact that the rickshaw was of the ownership of the accused and it was being plied by the accused himself, then, presumption can be raised against him that he used kerosene by mixing it with petrol to ply the rickshaw, with knowledge. She has further argued that with regard to prayer for benefit of probation to be given to the accused, no such prayer was made before the learned Judge of the trial Court and therefore now that question does not arise for consideration as to whether benefit of probation should be given to the accused or not. It was also submitted by the learned APP for the State that in view of findings of expert of FSL, Ms Pallaviben Thaker had carried out a test for smoking point and as per the evidence of Mrs Pallaviben Thakar during analysis of the sample, smoke point was found to be 23 mm and therefore now it cannot be agitated by the accused that the sample of the fuel was not kerosene. She has lastly argued that there is no substance in the present Criminal Revision and therefore it should be dismissed.

#. Before considering the rival submissions of both the parties, it would be necessary in the fitness of things to know the power and scope of this Court for deciding Criminal Revision Applications.

(1) In case of KHETRA BASI SAMAL & ANOTHER V. THE STATE OF ORISSA reported in AIR 1970 SC 272 the Hon'ble Supreme Court has held that the revisional jurisdiction conferred on the High Court u/s 439 of Cr.PC 1898 (which is equivalent to Section 401 of Cr.PC 1973) is not to be lightly exercised. This jurisdiction should be exercised by the High Court only in exceptional cases when there is some glaring defect in the procedure and there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

(2) In case of Narain Prasad v. State of Rajasthan reported in AIR 1978 Rajasthan 162, Full Bench of the Rajasthan High COurt has held that the revisional jurisdiction is normally to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is manifest error of point of law and consequently there has been flagrant miscarriage of

justice. The procedure of appraising the evidence led by two parties can be equated almost to the process of holding a balance, the time honoured symbol of justice. Sometime when the two pans of balance are seemingly equal, even a slight evidence circumstantial or otherwise, tilts the balance of one side and thereby probablise the case of one party as against the other. In this process of holding the balance what pieces of evidence, of course excluding inadmissible evidence would lean the balance in favour of one party is dependent on the evidence available in a given case. But asking the Revisional Court to say that this piece of evidence should have weighed more than the other, is nothing more than seeking reassessment of evidence. Appreciation of evidence is a mental process involving selection, assessment and conclusion. Which statement ought to weigh and how much cannot be rigidly laid down.

(3) In Bansi Lal & Ors. v. Laxman Singh AIR 1986 SC 1721 it has been held by the Hon'ble Supreme Court that from the very nature of the power of Revisional Court it should be exercised sparingly and with great care and caution.

(4) In case of Ramu @ Ramkumar & Ors. v. Jagannath reported in AIR 1994 SC 26, the Hon'ble Supreme Court has made it clear that it is well settled that the revisional jurisdiction conferred on the High Court should not be lightly exercised.

Keeping in mind the above legal position with regard to powers of this High Court and scope in such revision application in dealing with Criminal Revision Application, I will deal with the submissions of Mr Dave which he has urged for setting aside the order of conviction and sentntence and to acquit the accused by giving the benefit of doubt.

#. Admittedly, the case of the prosecution is very much specific that the accused has contravened Section 3 of the Order and as per Section 3 of the Order no person shall use or consume kerosene for any purpose other than cooking or ilumination both. In Section 2 of the said Order of 1966 a definition of "kerosene" is given and as per this definition kerosene shall have the meaning assigned to it in item no.7 of the First Schedule to the Central Excise and Salt Act, 1944 (No.1 of 1944) and shall not include aviation turbine fuel and therefore now it is necessary to refer to item no.7 of the First Schedule of the Central Excise and Salt Act, 1944. This item no.7 of the First Schedule below Central Excise and

Salt Act, 1944, is there on page no.26 of of CENCUS (Central Excise Manual October 1979) by D.N. Kohli and as per this item no.7 of the First Schedule of the Central Excise and Salt Act, 1944, definition of kerosene has been given as under:-

"7. KEROSENE

Kerosene, that is to say, any mineral oil (excluding mineral colza oil and turpentine substitute) which has a flame height of eighteen millimetres or more and is ordinarily used as an illuminant in oil burnig lamps.

Explanation I : The expression "mineral oil" has the meaning assigned to it in Explanation I to item No.6.

Explanation II : "Flame height" shall be determined in the apparatus known as the smoke point lamp in the manner prescribed in this behalf by the Central Government by notification in the Official Gazette."

##. According to the definition of kerosene given in item no.1 of the First Schedule the only requirement to come to the conclusion that particular fuel is kerosene or not, is only to ascertain a flame height of that fuel and there is no reference with regard to any boiling point in this definition.

It may be noted that prosecution has examined expert of FSL - Ms Pallaviben Thakar at Exh.4. She has deposed in detail at length and explained as to how the sample was received by the office of FSL and in what condition the sample bottle was received bythe office of FSL and the manner with regard to analysis of the sample and the contents of the report of Exh.6 given by her. It is pertinent to note that this witness had come to the trial COurt to give her evidence, by taking with her the work sheet in which observations which she noticed at the time of analysis were mentioned and on referring to that worksheet she found that during analysis smoke point was found to be 23 mm and thus the fuel which was analysed by her was conforming to the requirements to come to the conclusion that particular fuel is kerosene. As stated earlier, if for any mineral oil, the flame height is 18 mm or more and which is ordinarily used as illuminant in oil burning lamps then, that mineral oil is kerosene and therefore requirement of flame height was satisfied by the fuel which was analysed by the expert of FSL. It is

pertinent to note that this expert of FSL Ms Pallaviben Thakar has been cross-examined by the learned advocate for acused and in the cross-examination she has deposed that petroleum substance is a carbonic substance. A suggestion was made to her which is denied by her that when the bottle of sample of liquid was received by her office, it was not in sealed and intact condition. There is no cross-examination with regard to contents of report at Exh.6 which she has given. There is no cross-examination on the point of procedure which she followed to arrive at a conclusion that particular liquid was a kerosene. It may be noted that the report of the FSL was exhibited and admitted in evidence with the consent of the learned advocate for the accused who appeared before the trial Court to defend the accused and therefore there is no dispute with regard to the conclusion arrived at by Ms Thakar and also with regard to contents of report at Exh.6.

Looking to the cross-examination of Ms. Pallaviben Thakar, by the learned advocate for the accused, the only dispute taken by the accused is with regard to seal found on the bottom of sample of fuel which was sent to FSL. Looking to this cross-examination the report at Exh.6 of the FSL is not at all challenged and therfore all the contents of this report can be said tohave been admitted by the accused. When this Exh.6 is not challenged more particularly with regard to final result of the analysis, the prosecution has proved beyond reasonable dout that the fuel sample which was taken from the rickshaw of the accused, was nothing but kerosene.

##. Shri B.C. Dave, the learned advocate for the accused has argued that definition of kerosene as per item no.7 of the First Schedule to the Central Excise and Salt Act, 1944, cannot be looked into while deciding this case. It is his arguments that First Schedule to the Central Excise and Salt Act, 1944 has been omitted by Section 4 of the Central Excise Tariff Act with effect from 28.2.1986 and therefore any reference to the expression "First Schedule to the Central Excise and Salt Act, 1944" in any Central Act shall on or after commencement of the Act 5 of 1986 i.e. 28.2.1986 be construed as reference to First Schedule of the Central Excise Tariff Act ((5 of 1986). By advancing this argument, he has vehemently argued that now definition of kerosene as given in item no.7 of the First Schedule to Central Excise and Salt Act, 1944 cannot be looked into by this Court and further that this Court should take into consideration an item no.2710.19 of Chapter No.27 of the Central Excise Tariff Act, 1985. By drawing an

attention of this Court to item no.2710.19, Shri Dave has argued that as per this item, kerosene is defined as follows:-

> "Kerosene (which is ordinarily used as an illuminant in oil burning lamps) and aviation turbine fuel, that is to say, any hydrocarbon (oil excluding mineral colza turpentine substitute) which has a smoke point of eighteen millimeters or more and has a final boiling point not exceeding 300 degree C."

By citing this definition, Mr Dave has argued that in this case the expert of FSL has not carried out any test with regard to boiling point of the fuel in question. He has argued that looking to this definition of kerosene that fuel should conform to the test of the final boiling point which should be more than 300 degree Centigrade. Admittedly, looking to the report at Exh.6 of the FSL, Ms Pallaviben Thakar did not carry out any test with regard to final boiling point. Shri Dave could not show any material to show that particular test is very much required to be carried out to ascertain whether a particular fuel is kerosene or not. Looking to Exh.6, Ms Pallaviben Thakar has deposed about the method of analysis to ascertain as to whether the fuel in question was kerosene or not. It is not the case of the accused that this method of analysis is not recognised by any law or rules. As stated earlier, looking to fact that report at exh.6 is not challenged and more particularly the final result of the analysis, the arguments of Mr Dave cannot be accepted, because the words "that is to say any hydrocarbon oil excluding mineral colza, turpentine substitute which has a smoke point of 18 mm or more and final boiling point of not exceeding 300 deg. C." are used only for aviation turbine fuel and not for kerosene and therefore this Court is of the view that for ascertaining whether a particular fuel is kerosene or not, the tests stated in the aforesaid item no.2710.19 are not required to be carried out and that two tests are required to be carried out only for the aviation turbine fuel.

For a moment if it is believed that the aforesaid two tests viz. one with regard to smoke point and another for final boiling point are required to be carried out to ascertain as to whether a particular fuel is a kerosene or not, then, that definition of kerosene as stated in point no.2710.19 is not applicable to this present case because, as per Rule 2 of Kerosene (Restriction on Use) Order 1966, definition of kerosene

is required to be taken into consideration as per item no.7 of the First Schedule to the Central Excise Tariff Act, 1985. Admittedly, the Kerosene (Restriction on Use) Order 1966 has been made by the Central Government in exercise of the powers conferred on it u/s 3 of the Essential Commodities Act, 1955. If the Central Government wanted to see that definition of kerosene is to be looked into as per item no.2710.19 of Chapter 27 of the Central Excise Tariff Act, 1985, the Central Government must have amended Rule 2 of the Kerosene (Restriction on Use) Order 1966 but the Central Government thought it fit to keep the definition of kerosene as it is as contained in Rule 2 of the said Order 1966. The Central Government thought it fit to define kerosene as per item no.7 of the First Schedule to the Central Excise and Salt Act, 1944. Under the circumstances, this Court cannot import any other definition which Shri Dave wants this Court to look into for deciding this case which is for contravention of Rule 3 of the Kerosene (Restriction on Use) Order 1966 and therefore the contention of Shri Dave that this Court should take into consideration the definition of kerosene as per item No.2710.19 of Chapter 27 of the Central Excise Tariff Act, 1985, is rejected.

##. Now if we revert to the definition of kerosene as per item no.7 of the First Schedule to the Central Excise and Salt Act, 1944, we find that as per item no.7 test with regard to final boiling point is not required to be carried out to ascertain whether particular fuel is kerosene or not. As per said item no.7 kerosene means kerosene that is to say, any mineral oil excluding mineral colza, oil and turpentine substitute which has a flame height of 18 mm or more and is ordinarily used as illuminant in oil burning lamps. So as per this definition the only test for flame height is to be carried out and not the test of final boiling point. If we read the evidence of Ms Pallaviben Thakar, she has deposed in her evidence at para 5 that she had prepared a work sheet at the time of making analysis of the fuel in question and in that work sheet she had noted down the results of analysis and by referring to that worksheet she had deposed that smoke point of that fuel was 23 mm. As per explanation 2 below item no.7 of the First Schedule to the Central Excise and Salt Act, 1944 "flame height" shall be determined in the apparatus known as smoke point lamp in the manner prescribed by the Central Government in this behalf by notification in the Official Gazette and therefore to ascertain the flame height test of smoke point is required to be carried out. Here in this case, Ms Thakar has deposed that smoke point was 23

mm and therfore flame height of fuel in question was more than 18 mm and therefore the liquid analysed by Ms Thakkar was nothing but a kerosene. Therefore, in this case the prosecution has ably proved to the satisfaction of the Court that sample of fuel which was taken from the rickshaw was nothing but kerosene.

##. Shri Dave has argued that while recording the further statement u/s 313 of Cr.PC the learned judge of the trial court did not inform the accused that he has committed breach of Rule 3 of Order 1966 and thereby he has committed an offence punishable u/s 7 of the Act. He has argued that this type of question ought to have been asked by the learned judge of the trial court. He has further argued that looking to Section 313 of Cr.PC qeustions for all the circumstances should have been asked to accused to explain. If we read Section 313 of Cr.PC we find that a duty is cast upon the trial Court in every inquiry or trial for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him to put such questions as the Court considers necessary and that type of questions can be put by Court at any stage. Looking to Section 313 of Cr.PC questions are required to be asked to the accused so as to enable the accused to explain any circumstance appearing in the evidence against him. Therefore, on the basis of the evidence questions are required to be asked in further statement of the accused. It may be noted that before prosecution could start to produce evidence in the case, a plea of the accused was recorded on 14.12.1989 at exh.1 and in that plea a question with relevant facts were put to accused and by that question it was asked as to whether he pleads guilty for an offence punishable under Section 7 of the Essential Commodities Act for contravention of Section 3 of the Kerosene (Restriction on Use) Order 1966 and in reply to that question accused pleaded not guilty to the charge and therefore he was knowing as to for what offence he was facing trial. After completion of recording of the evidence, necessary questions were asked to the accused. It may, at this juncture be noted that looking to the cross-examination of the complainant MR Rehamtullakhan Savaikhan Exh.7 we find that there is no dispute with regard to taking of sample of fuel from his rickshaw. Looking to the cross-examination a question in form of suggestion was asked that his rickshaw was stopped at Kalupur Circle. Another suggestion was put that panchnama was drawn inside police chowky near Kalupur circle. These suggestions are denied by the compainant. There is no dispute with regard to taking of sample of fuel from the rickshaw. It makes no difference as to

whether that rickshaw was stopped at Kalupur over bridge or at Kalupur circle. One another suggestion was put that panch witnesses were not kept present while procedure was being done for taking sample from the rickshaw. It may be noted further that in this case the prosectuion has examined panch witness Dipakkumar at Exh.11 in whose presence sample was taken from the rickshaw of the accused. There is no reason for this panch witness to depose against the accused. If we read answers given to questions put to accused in his further statement, we find that accused has admitted while replying to the question no.2 that on 12.12.1988 he was stopeed at Kalupur Police Chowky at about 5.30 to 6.00 PM. He has also admitted that one expert from FSL was present with the complainant PSI Shir R.S. Sindhi at the place where he was stopped by the complainant. He has also admitted that on that day he was driving rickshaw and was proceeding towards Kalupur. As stated earlier, the exact place where he was stopped is not material for this case. The case is with regard to taking of sample of fuel from the rickshaw in the presence of the panch witnesses. A pertinent question was put to accused that there was a lot of smoke emitting from the rickshaw and the accused had admitted that it was true that smoke emitting from rickshaw's silencer, since silencer was damaged and lubricating oil was leaking and as that lubricating oil was being burnt, there was a smoke. Therefore, there is no dispute with regard to excessive smoke emitting from the rickshaw. Under the circumstances, questions with regard to the evidence which can be used against the accused were put to the accused and the accused replied in such a way that practically he has admitted the case of the prosecution. Therefore, the contention of Shri Dave that the question with regard to circumstances which may be used against the accused were not asked in further statement is rejected. In support of his argument, he has cited an authority reported in AIR 1984 SC 1822 in the case of SHARAD BIRDHICHAND SARDA V. STATE OF MAHARASHTRA. There cannot be any dispute with regard to the principles laid down in this authority. Here in this case looking to the facts and circumstances of the case and more particularly the answers given by the accused to the questions put to him in his further statement, this authority is not applicable to the present case.

##. During the course of the arguments, Shri Dave produced one affidavit of accused dated 24.3.2000. That affidavit is taken and is kept on record. As per this affidavit the accused has stated that now he has stopped his business of plying rickshaw after the incident and

therefore there is no question of repetition of the similar offence in future. He has also stated in his affidavit that he is the only earning member in his family and he is having two sons and minor daughter and at present he is earning his livelihood by working in a private company. He has further stated in his affidavit that since he has stopped plying rickshaw long back and since there is no likelihood of repetition of similar offence in future, he may be released on probation under the Probation of Offenders Act.

##. By producing this affidavit Shri Dave has argued that in case if this Court comes to the conclusion that there is no merit in this Criminal Revision Application, then, this Court should show mercy to the accused and he may be ordered to be released on probation as per the provisions of the Probation of Offenders Act, 1958. For this he has cited an authority of State of Gujarat v. Ganpatbhai Premjibhai Joshi reported in1998 (2) GLH 787. As per this authority accused who faced the trial for offence punishable u/s 7 of the Essential Commodities Act, 1955 was released on probation u/s 4 of the Probation of Offenders Act, 1958. For quantum of sentence, these arguments will be considered hereinafter.

##. Shri B.C. Dave has argued that there is no evidence that accused has added kerosene in the tank of the rickshaw and that it is not proved that the accused has used kerosene for plying the rickshaw. This contention is devoid of merits because from the evidence it is proved beyond reasonable doubt that the accused was coming by driving the rickshaw and he was stopped by the complainant and in the presence of the panch witnesses a sample of fuel was taken from the rickshaw and that sample of fuel was analysed by the expert of FSL and the same was found to be kerosene. This evidence clearly shows that the accused was found using kerosene with petrol in his rickshaw. As per Section 3 of the Order of 1966 no person shall use or consume kerosene for any purpose other than cooking or illumination or both. So not only that use of kerosene is restricted but even consumption of kerosene for the purpose other than cooking or illumination or both is also restricted. When the accused was found plying rickshaw using kerosene as fuel, then contravention of Section 3 is completely proved and therefore the arguments of Mr Dave cannot be accpeted. Here in this case provisions of Section 10(C) of the Essential Commodities Act 1955 are required to be taken into consideration. As per Section 10-C of the Act, in any prosecution for any offence under this Act which requires a culpable mental state on the accused,

the Court shall presume the existence of mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. As per explanation below subsection (1) of Section 10-C of the said Act culpable mental state includes intention, motive knowledge of a fact and the belief in, or reason to believe a fact and therefore when accused was found that in the tank of rickshaw which he was plying there was a fuel which was containing kerosene and in view of Section 10-C presumption of culpable mental state is made against accused to the effect that accused knowingly used kerosene as fuel in his rickshaw and therefore contention of Shri Dave that prosecution has failed to prove that accused added kerosene, is required to be rejected.

##. The last contention of Shri Dave is to the effect that Ms Pallaviben Thakar, expert of FSL, has not produced the note which she has referred to in her evidence at para 5 of her deposition. It may be noted that looking to the evidence of Ms Thakar, she had attended the Court along with work sheet in which she noted down the results of the analysis and on referring to that worksheet she deposed to the effect that smoke point of the fuel which she analysed was 23 mm. It may be noted that on the basis of the results noted down in the work sheet she prepared a final report of analysis which she had produced at Exh.6. As discussed earlier, report at exh.6 is not at all challenged by the accused and therefore it was of no use for the prosecution to produce the said work sheet. Still however, when she attended the Court along with the work sheet, the learned advocate for the accused could have asked witness Ms Pallaviben Thakar to produce the same in the record for his defence purpose. It appears that no such attempt has been made by the learned advocate for the accused. Shri Dave, learned advocate for the accused - Revision Petitioner, has not pointed out any material to show that for want of this work sheet accused has been seriously prejudiced in his defence. At the cost of repetition, it is stated that looking to the cross-examination of Ms Thakar, there is no dispute with regard to final report Exh.6 for the fuel in question and therefore this fourth contention is also rejected.

##. In this case, three important witnesses are examined. First is complainant, second is panch witness and the third is expert of FSL. The complainant PW 2 Shri Sonwane at Exh.17 has deposed according to his complaint and he has proved complaint lodged by him. If we read cross-examination of this complainant by the

learned advocate for the accused, we find that only following suggestions were put in cross-examination and the complainant has denied the said suggestions.

(1) It was suggested by the accused that rickshaw was intercepted at Kalupur Circle.

(2) It was suggested that Panchanama was drawn in Police Chowky near Kalupur circle.

(3) It was suggested that while taking sample of fuel from the rickshaw panch witnesses were not present and the panch witnesses have signed the pre-written panchanama.

(4) It was suggested that the complainant has filed a false case against the accused.

The above suggestions were in the form of defence and that suggestions have specifically been denied by the complainant.

In the case of KHIMJIBHIA KURJIBHAI V. THE STATE OF GUJARAT reported in 1982 Cr.L.R. (Gujarat) 381 it has been held as under:-

"Suggestions in corss-examination are no evidence. This proposition of law is good both in the case of the prosecution and the defence. Mere hurling of some such suggestions which are denied, can hardly take the place of proof or evidence. The Law of Evidence is alike both for the prosecution and for the defence. If the accused wants to establish a certain fact, he has to lead evidence on that score. Such suspicion cannot have any place in the realm of appreciation of evidence. We reiterate that a suggestion denied by a witness remains only a suggestion and has no evidentiary value at all."

Therefore, looking to the cross-examination of the complainant when the complainant has denied the suggestions put up by the learned advocate for the accused, there remains hardly no other defence in the cross-examination. It may be noted that on the points of stopping rickshaw by the complainant and taking sample from the tank of the rickshaw, there is no cross-examination at all. In the cross-examination there is no case put up by the accused as to why the complainant lodged a case against him. Therefore, on

reading the evidence of complainant together with complaint at exh.8 the prosecution has proved the case beyond reasonable doubt. To get the corroboration from the independent witness, the prosecution has examined panch witness also. That panch witness Shri Dipakkumar Mohanlal at Exh.11 has deposed according to the prosecution case. If we read the cross-examination of this witness, a suggestion was put that his residential house is situated in Kalupur Bhandari Pole which is nearer to Kalupur Police Chowky and he is called as panch witness off and on by the police. This suggestion has been denied by the said witness. He has also deposed in his evidence that except the day on which he acted as panch witness on the day of the occurrence he never acted as a panch witness in other cases. In his cross-examination mere suggestions were put that he was called in Kalupur Police Chowky where he signed the prepared panchnama. It was also suggested that he did not see the procedure of taking the sample. All these suggestions are denied by him and therefore there is no cross-examination on the point of stopping of the rickshaw by the complainant at Kalupur Overbridge at about 5 PM on 12.12.1988 and sample of fuel was taken from the tank of the said rickshaw. There is no cross-examination on the point with regard to sealing procedure done on the bottle of the fuel which was taken from the tank of the rickshaw. Therefore, on reading the evidence of this panch witness, the learned Judge of the trial court has rightly concluded that evidence of the complainat gets corroboration from this independent witness also. Thus, looking to the suggestions put in the cross-examiantion of the witnesses there is no serious dispute with regard to taking of sample from the tank of the rickshaw of the accused on the date of the incident. There is no dispute with regard to sealing procedure on the bottle of the fuel taken from the tank of the rickshaw.

It may be noted that prosecution has examined one Vithalrao Sonwane. He investigated the case and ultimately he chargesheeted the accused. He has deposed in detail in the Court as to what investigation he carried out and I find that there is no cross-examination at all from the side of the accused. He has specifically deposed that when he was entrusted with the investigation of this case on 13.12.1988, he received the complaint, panchnama, bottle of sample of fuel, etc. and he forwarded that bottle of the fuel to FSL. He has deposed that when received the bottle of sample of fuel, it was in a sealed and intact condition and he sent the bottle in the same condition to the FSL. Ms Thakar, expert of

the FSL, has also deposed that on 26.12.1988 a sample of bottle of fuel in a sealed condition was received along with a forwarding letter.

Thus, the prosecution has led sufficient evidence to prove the case against the accused. The learned Judge of the trial court has assigned the reasons based on the evidence. There cannot be any other conclusion except that of case being proved against the accused and therefore this Court finds that there is no other circumstance to come to a conclusion other than the conclusion arrived at by the learned Judge of the trial court more particularly, when the learned Judge of the trial COurt has assigned cogent and plausible reasons based on oral as well as documentary evidence and thus the case is proved and in no case it can be said that the case is not proved beyond reasonable doubt.

##. Now the question comes for this Court to decide as to what sentence should be inflicted to accused for an offence for which his plea was recorded. It may be noted that as per Section 7(1)(a)(ii) of the Essential Commodities Act, 1955, minimum sentence of 3 months is prescribed and the learned Judge of the trial court has inflicted minimum sentence of RI for 3 months only. Looking to Sectin 7(1)(a)(ii) of the said Act if any person contravense any order made u/s 3 in the case of any other order (other than order made with reference to clause (h) or clause (i) of sub-section (2) of Section 3 of the Act) then he shall be punishable with the imprisonment for a term which shall not be less than 3 months but which may extend to 7 years and also liable to fine. Under the circumstances, it cannot be said that the quantum of sentence is disproportionate to the nature of the offence. Shri Dave has vehemently argued that looking to the affidavit filed by the Revision Petiitoner in this matter, this Court should show mercy to the accused and he should be released on probation by giving the benefit of Section 4 of the Probation of Offenders Act, 1958, and in support of that submission he has relied on the authority reported in 1998 (2) GLH 787.

##. Looking to the nature of the offence, accused used kerosene instead of petrol in his rickshaw. Admittedly, there was huge smoke emitting from the silencer of the rickshaw when he was stopped by the complainant and that smoke admittedly polluted the atmosphere. It is our day-today experience that in city like Ahmedabad rickshaw drivers are used to use kerosene instead of petrol in their rickshaws and there is a lot of pollution due to this smoke of kerosene everywhere in the city especially

during peak hours. Therefore, looking to the nature of the offence, this is a case of air pollution. The Parliament has enacted a specific Act named Air (Prevention and Control of Pollution) Act, 1981 for abatement of pollution in air. Therefore, this case cannot be treated lightly while inflicting the sentence. This is not a case of any moral turpitude so that benefit of probation can be given to the accused. Looking to the nature of the offence, it is a case against the society and therefore this Court is of the opinion that no lighter view can be taken on the point of quantum of sentence. The learned Judge of the trial Court has inflicted the minimum sentence prescribed u/s 7 of the Act. This Court finds no sufficient reason to reduce the sentence by giving the benefit of probation u/s 4 of the Probation of Offenders Act. Therefore, the submission of Mr Dave to grnat the benefit of probation to the accused cannot be accepted, in the interest of public at large.

##. In view of the discussion made hereinabove, there is no merit in this Criminal Revision Application. It deserves to be dismissed. Accordingly, it is dismissed by confirming the judgement and order (Exh.8) dated 7.2.1990 rendered by the Special Judge, Ahmedabad, in Special Criminal Case No.110 of 1989. Rule is discharged.

Bail order granted on 6.3.1990 by this Court (Coram: J.U. Mehta, J.) is cancelled. The Revision Petitioner is ordered and directed by this Court to surrender before the learned trial Court to serve out the sentence within 21 days from the date of this order.

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